BAN HIN LEE BANK BHD.

v.

GAN BOON WAH & ORS.

HIGH COURT, SINGAPORE
KAN TING CHIU JC
[SUIT NO. 1254 OF 1990]
8 AUGUST 1991

CONTRACT: *Right of surety to claim contribution - When such right accrued.*

On 23 December 1988 the plaintiffs granted loan facilities to TWL and the defendants and the third party executed a joint and several guarantee. TWL failed to repay the loan and the plaintiffs sued the defendants on the guarantee. Judgment was entered against the defendants on 2 April 1991 and the defendants paid the judgment sum on 25 June 1991.

Meanwhile, the defendants had applied on 30 November 1990 under O. 14 of the Rules of the Supreme Court 1970 (RSC) for an order that the third party pay 50% of the plaintiffs' claim as contribution to the defendants. The order was granted by the Assistant Registrar on 28 March 1991. The present appeal by the third party is in respect of that order.

An argument was raised as to whether the defendants were entitled to claim relief from their co-guarantors on 30 November 1990.

Held:

[1] When a creditor has obtained judgment or its equivalent against him, he is entitled to a declaration of his right to contribution, the contribution to be made after he has paid the creditor's claim or more than his share, and when he admits the creditor's claim, he may be entitled to a declaration of his right to contribution, the contribution to be made after he has paid the creditor's claim or more than his share thereof.

[2] In the instant case, the defendants had not admitted the plaintiffs' claim nor was judgment entered against them on 30 November 1990 when they applied for summary judgment against the third party. They were disputing their liability until 2 April 1991 when judgment was entered against them.

[3] They had not made payment, nor became liable to do so under a judgment, nor shown any willingness to pay the bank's claim when they sought and obtained relief against their co-guarantors.

[4] The question whether the defendants' application for relief against the third party was made before the right of the defendants to do so had accrued is an issue which must go for trial.

[Appeal allowed with half the costs.]

Cases referred to:

Ex parte Gifford [1802] 6 Ves 805 ***(cit)***
Davies v. Humphreys [1840] 6 M & W 153 ***(cit)***
Re Snowdon, ex parte Snowdon [1881] 17 Ch D 44 ***(cit)***
Wolmerhausen v. Gullick [1893] 2 Ch 514 ***(cons)***
Woolmington v. Bronze Lamp Restaurant Pty. Ltd. [1984] 2 NSWR 242 ***(cons)***
Steel v. Dixon [1881] 17 Ch D 825 ***(cit)***

Standard Chartered Bank v. Walker [1982] 1 WLR 1410 ***(cit)***
Fairline Shipping Corp. v. Adamson [1975] 1 QB 180 ***(cit)***
Mackretch v. Walmsley [1884] 51 LT 19 ***(cit)***

Legislation referred to:
Rules of Supreme Court 1970 [Sing], O. 14

For the appellants/third party - Dhilhan Pillay and Chong Yee Leong
For the respondents/defendants - A.A. Abbas

JUDGMENT

Kan Ting Chiu JC:

On 23 December 1988 the three defendants and the three persons joined as the third party, being the directors of Tien Wah Litho Printing Co. (Pte.) Ltd. (the company), executed a joint and several guarantee to the Ban Hin Lee Bank Berhad (the bank) in respect of facilities the bank was giving to the company.

In 1989, the company was in financial difficulties and was unable to discharge its liabilities to the bank. On 16 June 1990 the bank sued the defendants on the guarantee. Although the defendants resisted the claim, judgment was entered against them on 2 April 1991 for the sum of $160,502.89, interest and costs. The defendants satisfied the judgment on 25 June 1991.

When they were sued, the defendants joined the three other co-guarantors as third party in the proceedings, and on 30 November 1990 they applied under O. 14 of the Rules of the Supreme Court 1970, for, *inter alia*:

> A declaration that the third party jointly and severally indemnify and/or contribute to the defendants in the sum equivalent to 50 percent of the plaintiffs' claim including interest and costs thereof.

and an order that:

> The third party jointly and severally pay the sum equivalent to 50 percent of the plaintiffs' claim including interest and costs thereof to the defendants as soon as the defendants settle the plaintiffs' claim therein upon such claim (*sic*) which this Honourable Court may decide.

The Assistant Registrar granted their application on 28 March 1991. The matter came before me on appeal against his decision.

The chronology of the developments in the plaintiffs' claim against the defendants and the defendants' claims against the third party has been set out because there was a doubt whether the defendants were entitled to claim relief from their co-guarantors on 30 November 1990 when they applied for judgment against them.

It is well settled that a surety can only claim contribution from his co-sureties after he has paid a larger sum than his proportion of the debt to the creditor - *Ex parte Gifford* [1802] 6 Ves 805, *Davies v. Humphreys* [1840] 6 M & W 153, *Re Snowdon, ex parte Snowdon* [1881] 17 Ch D 44.

However, a surety may be entitled to *quia timet* declaratory relief before he makes payment. The defendants' Counsel relied on two authorities to support his contention that the defendants were entitled to make their claims against the third party. The first authority was *Wolmerhausen v. Gullick* [1893] 2 Ch 514. In this case the plaintiff was the executrix of the estate of a deceased surety who with four others guaranteed the debt of a company to a

bank. The bank put a claim against the estate. The claim was resisted by the executrix, but it was allowed for a reduced amount, and the executrix was called upon to make payment. Before doing that, the executrix brought an action against the co-sureties for contribution. The allowance of the bank's claim was accepted by Wright J to be equivalent to a judgment against the estate. After an exhaustive examination of the development of the law of contribution, the learned Judge concluded that he could not order the co-sureties to make contribution to the executrix, but he made a declaration that whenever she paid any sum beyond her share, she was entitled to contribution.

The second case was *Woolmington v. Bronze Lamp Restaurant Pty. Ltd.* [1984] 2 NSWR 242 where Needham J said that a guarantor would also be entitled to relief against his co-guarantors if he satisfies the Court that he is willing, able and prepared to pay the creditor's claim or more than his share thereof.

These and other cases dealing with a guarantor's right to contribution from his co-guarantors suggest that relief may be granted in the following circumstances:

(i) when he has paid the creditor's claim, or more than his own share, he is entitled to contribution from them,

(ii) when the creditor has obtained judgment or its equivalent against him, he is entitled to a declaration of his right to contribution, the contribution to be made after he has paid the creditor's claim or more than his share thereof, and

(iii) when he admits the creditor's claim, he may be entitled to a declaration of his right to contribution, the contribution to be made after he has paid the creditor's claim or more than his share thereof.

As already stated, the first proposition is well settled. The second proposition, drawn from Wright J's judgment in *Wolmerhausen*, is also accepted as established law. The third proposition, which is the least established, is consistent and compatible with the other two propositions. If a surety is entitled to relief after he makes payment without a judgment being entered against him, or after a judgment has been entered but before he makes payment, he should also be entitled to relief when he admits liability without a judgment. There is no purpose in insisting on a suit or a judgment if the surety admits his liability. Towards his co-sureties, he should only be required to justify that his admission of liability was correct and was for the proper amount.

Reverting to the facts of the case, the defendants had not admitted the bank's claim nor was judgment entered against them on 30 November 1990 when they applied for summary judgment against the third party. They were disputing their liability until judgment was entered against them on 2 April 1991. They had not made payment, nor became liable to do so under a judgment, nor shown any willingness to pay the bank's claim when they sought and obtained relief against their co-guarantors.

Counsel for the third party also raised three other issues, firstly that the 1st defendant had misrepresented to the 1st third party that the company had enough funds to repay the bank's loans; secondly, that there were irregularities concerning some bills of exchange drawn by the company; and thirdly, that there was an agreement which varied the right of contribution.

The misrepresentation was alleged to be made by the 1st defendant as finance director to the 1st third party as managing director of the company eight months after the execution of the guarantee. The bills of exchange were issued by the company in the course of its business.

These matters were not related to the parties' dealings *inter se* as co-sureties. Even if the allegations were made out, it would have been the company which would be entitled to take action against the errant directors and officers for failing to discharge their duties towards the company.

Counsel for the third party referred to *Steel v. Dixon* [1881] 17 Ch D 825 as authority that a co-surety may forfeit his right to contribution from his co-sureties by his default in performing his duties towards them, and to *Standard Chartered Bank v. Walker* [1982] 1 WLR 1410 and *Fairline Shipping Corp. v. Adamson* [1975] 1 QB 180 and *Mackretch v. Walmsley* [1884] 51 LT 19. None of these cases go any way to suggest that a director-guarantor who fails to discharge his duties as director will lose his right to contribution from his co-guarantors in respect of the company's debts.

The last issue raised that there was an agreement to vary the right of contribution was also without basis. The agreement relied upon was a draft agreement which was not executed. Furthermore, whereas the third party claimed that their principals, C & C Holdings Ltd., a company incorporated and having its registered office in Liberia, and Sovran Holdings SA, a company incorporated and having its office in Panama, were parties to the agreement, the draft referred to companies of the same names, but which were incorporated in Hong Kong and had their registered offices there.

After considering the arguments, I find that whether the defendants' application for relief against the third party was made before the right to do so had accrued is an issue which should go for trial. The appeal is allowed with half the costs of this appeal. The Assistant Registrar's judgment is set aside and the third party shall have unconditional leave to defend the defendants' claims against them.

Also found at [1991] 3 CLJ 2262